Filed 3/11/09 In re J.T. CA2/7

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

In re J.T., a Person Coming Under the Juvenile Court Law.	B209819 (Los Angeles County Super. Ct. No. CK 54705)
LOS ANGELES COUNTY DEPARTMENT OF CHILDREN AND FAMILY SERVICES, Plaintiff and Respondent, v. J.D., Defendant and Appellant.	

APPEAL from orders of the Superior Court of Los Angeles County. Jan G. Levine, Judge. Affirmed.

Neale B. Gold for Defendant and Appellant.

Raymond G. Fortner, Jr., County Counsel, James M. Owens, Assistant County Counsel, and Byron G. Shibata, Senior Associate County Counsel, for Plaintiff and Respondent.

J.D., the mother of minor J.T., appeals from the order terminating her parental rights after a Welfare and Institutions Code section[1] 366.26 hearing and from the order denying her section 388 petition. Appellant contends that the juvenile court abused its discretion when it denied her section 388 petition without a hearing and that the court committed reversible error when it terminated her parental rights as she established the continuing beneficial relationship exception to termination. We affirm.

FACTUAL AND PROCEDURAL SYNOPSIS

I. Detention

On February 25, 2004, the Los Angeles County Department of Children and Family Services (Department) filed a section 300, subdivision (b) petition on behalf of infant J. The Department detained J. after the Sheriff's Department found J. and his 15-year-old mother after she was reported missing. At the time, appellant had no food or diapers for the child. The petition alleged appellant had behavior problems, including chronic running away. Appellant had her own prior dependency history, and the alleged father had a criminal history with an active warrant for his arrest

The sheriff's deputy who responded to 15 reports of a missing person or runaway for appellant reported appellant was incorrigible, very defiant and hung out with criminals. The maternal grandfather (grandfather) informed the social worker (CSW) that appellant had been kicked out of school in the eighth grade and that she ran away from home all the time. The maternal grandmother lived in Florida, but her exact whereabouts were unknown. Appellant admitted she lacked the skills to care for her child, but she was willing to go back to school and participate in counseling and parenting.

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[1] All statutory references are to the Welfare and Institutions Code.

At the detention hearing, the court found a prima facie case and detained J. The court ordered the Department to provide family reunification services. Appellant was given weekly visits with her son, who was released to grandfather's care.

II. Jurisdiction/Disposition

Appellant wanted her baby to remain with grandfather, who agreed to care for J. The Department agreed placing J. in grandfather's home would facilitate reunification.

Grandfather told the CSW his goal was to watch over J. until the child's parents were mature enough to care for the child themselves. Grandfather said he believed father was controlling and a bad influence on appellant, who was four years younger than father. The CSW made a similar assessment of the parents.

On March 16, J. was placed with grandfather. Appellant was still residing with grandfather. In the past, appellant had conflicts with grandfather because he did not approve of father coming to the house to visit J. Appellant admitted she frequently ran away because of that dynamic. Appellant also admitted she knew she had to do better, "It's just that I always do good at first then I mess up." Appellant told the CSW that she continued to care for her son, i.e., she had been burping him, feeding him, giving him baths, and seeing him often.

Grandfather observed appellant inappropriately caring for J.; once he saw appellant walking down the street while J. was left alone in the home. On another occasion, appellant went to father's home without making arrangements for J. Grandfather opined appellant was not responsible or mature enough to care for J. and was inconsistent in her statements and behavior.

The paternal grandmother believed appellant was nurturing and assumed responsibilities for J.; she opined that appellant could care for the child with the assistance of father and other relatives.

At the jurisdiction/disposition hearing, the court adjudged J. a dependent and ordered the Department to provide reunification services. The court sustained the petition as amended and ordered appellant to enroll in individual counseling, parent education, to participate in Downey Exchange support services, attend school, obey grandfather's rules and to have no unsupervised contact with J.'s father. The court admonished appellant about the importance of being in substantial compliance with case plan orders or reunification services might be terminated.

III. Review Hearings

A. Six Month Review (October 27, 2004)

J. was developing normally. Appellant was having some difficulty complying with the court-ordered services and having infrequent visits with J. Appellant was considering her own placement in a foster home to improve the situation.

The court indicated it did not believe appellant was entitled to continuation of services based on her involvement to that point. Appellant requested a contested hearing. The court admonished appellant, who was a foster youth and a minor, that her son deserved to have stability and be in one home with someone who loved him and met his needs. The court noted appellant had not showed she could take care of her baby and informed her the law gave her six months to prove she had the ability to take care of her baby, and if she could not show that she could care for the baby, the court's emphasis would change from reuniting the family to what was best for the baby.

The Department was willing to extend services for six months because appellant had not received referrals earlier. Appellant had requested referrals and visits and was cooperating with the Department.

The Department indicated that appellant had been unmotivated during the first six months of her services and was having difficulties in her relationships with father and grandfather. Appellant had not fully complied with the court's orders. Grandfather

reported appellant frequently was not present in the house and he and she had little contact. In October, appellant was placed in a foster home of her own and re-enrolled in school.

At the hearing, the court order continuation of services and noted appellant was in partial compliance with the case plan. The court commended appellant for her efforts and encouraged her continued compliance.

B. Twelve Month Review (April 25, 2005)

Appellant had begun seeing a therapist bimonthly; she was cooperative, participated and responded well to the therapist. Appellant was complying with the case plan and had weekly monitored visits with J. However, the foster parents reported appellant had gone AWOL once in November 2004 and was untruthful at times and in contact with father.

J. remained with grandfather and continued to develop normally.

At the hearing, the court found appellant was in partial compliance with the case plan and the Department had provided reasonable services. The court ordered the Department to continue to provide services.

C. Eighteen Month Review (August 30, 2005)

In May 2005, appellant was noted to be visiting J. weekly; appellant reported the visits went well and she enjoyed being with her son. Appellant returned to grandfather's home on May 3 after the termination of her own dependency.

Once out of foster care and back in grandfather's care, appellant was noted to rarely be at home; her visits with J. became sporadic as she would stay away for days or leave early in the morning and not return until late in the evening. Appellant stopped attending individual and conjoint counseling and stopped attending school.

At the hearing, the court found that the Department had complied with the case plan and provided reasonable services and that appellant was only in partial compliance with the case plan. The court terminated appellant's reunification services and set a section 366.26 hearing.

IV. Section 366.26 Proceedings

Appellant was not always at grandfather's home and visited her son sporadically. Appellant's whereabouts were unknown and a protective custody warrant was filed. Grandfather wanted to pursue legal guardianship and was not interested in adopting J.

At the December 19, 2005, hearing, the court appointed grandfather as J.'s legal guardian. The court ordered appellant was to continue to have weekly visits monitored by grandfather with discretion to liberalize those visits.

The Department reported J. was developing normally, able to walk, run and jump and was "very playful." The CSW observed J. was smiling and laughing, clean, and well dressed. J. was a "very happy toddler" and very active; he could talk and count, knew his colors and the names of people, and could apply concepts. Grandfather was actively engaged with J.

Appellant's involvement in her son's life remained sporadic. At the February 21, 2006, hearing, the court ordered a permanent plan of legal guardianship for J. The court also ordered the Department to provide permanent placement services for the family.

Appellant turned 18 in early 2006 and stopped living in grandfather's home on a permanent basis. In late 2007, grandfather asked appellant to leave the home based on the CSW's comments that appellant's presence affected funding for J.[2]

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[2] Appellant claimed that during 2007 she was living in grandfather's house, but was forced to hide from the CSW or she would be kicked out of the house.

In February 2007, grandfather changed his mind and became interested in adopting J. The court ordered the Department to prepare an adoption assessment report and initiate an adoptive home study and set another section 366.26 hearing.

By May, grandfather was very interested in adopting J. The home study was still in progress and was expected to be completed by June. The Department opined grandfather was the only person J. looked up to as a parental figure, grandfather met J.'s needs and grandfather was committed to providing an adoptive home.

Although appellant did not maintain a set time, she visited J. one or two times per week. Appellant informed the CSW that she did not want her son to be adopted and she intended to file a section 388 petition. Appellant, who did have a permanent residence and was living with friends, stated she could not currently care for J., but she would be able to do so in the future. The Department recommended J. be adopted and reported J. was bonded to his grandfather.

The section 366.26 hearing was continued a number of times due to notice problems.

Grandfather indicated he wanted to remain J.'s legal guardian, but also expressed a desire to adopt J. The Department only recommended adoption. The homestudy of grandfather's home was completed and his home was approved on July 25, 2007. The Department reported J. continued to develop well in grandfather's placement with no identifiable problems.

In reports received by court in September 2007 and January 2008, the CSW stated appellant visited her son once or twice a week despite the fact she was living all over. (CT 669, 671, 703, 735)~Grandfather admitted appellant was involved with her son and conceded he wanted them to have contact as a child needs his mother. Appellant did not want her son to be adopted by grandfather.

Appellant moved to a friend's house around the corner and then to Florida in January 2008 to avoid being homeless. Appellant stated she continued to want the opportunity to raise her son.

V. Section 388 Petitions

Appellant filed her first section 388 petition on March 11, 2008, in which she requested the court initiate an interstate compact on the placement of children study, terminate J.'s legal guardianship, reinstate reunification services and eventually return J. to her when appropriate. Appellant claimed the initial risk factors were no longer present and she had a stable job and housing, but she did provide details regarding those matters. Appellant also claimed she had a strong bond with J. The court found J.'s best interests would not be promoted by the proposed change and denied the request without a hearing.

Appellant filed a second petition on April 24, 2008, requesting the same relief on the same basis as the previous petition. The petition attached letters from appellant and the maternal grandmother. Appellant stated she had been kicked out of grandfather's home and moved to Florida to avoid being homeless. Appellant claimed she was having a lot of problems with the CSW and believed there were many inaccuracies in the CSW's reports to the court. The court denied the second request without a hearing finding it was not in J.'s best interests.

The CSW stated appellant had visited her son once or twice a week until she moved to Florida at which time she stopped visiting but continued to call him weekly. The Department informed the court that appellant moved to Tennessee in April 2008 for unspecified reasons.

Appellant filed her third petition on July 21, 2008, again requesting reinstatement of reunification services so she could reunite with her son. Appellant stated: "I have a good job and finished parenting classes[.] [I'm] older and [I've] always wanted to be [a part] of my [son's] life & also have a steady place of residence for me and him to live. [¶] . . . I feel there are [too] many people in [J.'s] life[.] [I've] never had the right chance to raise him with me [and I'll] give him just as much opportunity as anywhere else." Appellant attached a certificate she had completed a parenting class in Tennessee. The court again denied the request without a hearing noting there was no evidence of

appellant's completion of individual counseling. The court found appellant had failed to show sufficient evidence of changed circumstances or best interests that would warrant the changes she sought.

VI. Termination of Parental Rights

In July, the Department reported J. was learning at a fast rate, including some math and spelling. Appellant was still living out of state.

The court held a contested hearing on July 29, 2008. Appellant testified about her relationship with her son and stated she did not want him to be adopted. Appellant stated the last time she saw J. was six months ago, but she called him two or three times a week. The court found J. was adoptable, appellant had maintained an inconsistent presence in J.'s life, and appellant's bond with him did not outweigh the benefit of adoption. The court terminated appellant's parental rights and ordered adoption as J.'s permanent plan.

Appellant filed a timely notice of appeal from the denial of her three section 388 petitions and the termination of her parental rights.

DISCUSSION

I. Section 388 Petition

Appellant contends the court abused its discretion when it denied without a hearing her third section 388 petition requesting reinstatement of reunifications services.[3] A section 388 petition requires a showing (1) that a change of circumstances warrants a change in a prior order of the juvenile court and (2) that the requested change is in the

[3] It appears appellant's notice of appeal was untimely as to the denial of her first two section 388 petitions.

best interests of the child. (Cal. Rules of Court, rule 5.570(e); *In re Daijah T.* (2000) 83 Cal.App.4th 666, 674.)

"If the petition presents any evidence that a hearing would promote the best interests of the child, the court will order the hearing. 'The parent need only make a prima facie showing to trigger the right to proceed by way of a full hearing.' 'A "prima facie" showing refers to those facts which will sustain a favorable decision if the evidence submitted in support of the allegations by the petitioner is credited.'" (Citations omitted.) (*In re Daijah T., supra*, 83 Cal.App.4th at p. 673.)

However, a party filing a section 388 petition is not automatically entitled to a full hearing on the motion. If the petition fails to state a change of circumstances that might require a change of order, the court may deny the application ex parte. (Cal. Rules of Court, rule 5.570(d).) "The petition is addressed to the sound discretion of the juvenile court and its discretion will not be disturbed on appeal in the absence of a clear abuse of discretion." (*In re Jasmon O.* (1994) 8 Cal.4th 398, 415; see also *In re Jamika W.* (1997) 54 Cal.App.4th 1446, 1451 [The denial of a petition without a hearing is reviewed for an abuse of discretion keeping in mind "'the change of circumstances or new evidence must be of such significant nature that it requires a setting aside or modification of the challenged prior order.'"].) Whether appellant made a sufficient showing entitling her to a hearing "depends on the facts alleged in her petition, as well as the facts established as without dispute by the court's own file." (*In re Angel B.* (2002) 97 Cal.App.4th 454, 461.)

Appellant asserts she pleaded facts showing changed circumstances as she had obtained a good job, had a steady residence, completed a parenting class and was no longer a minor herself and desired the opportunity to be a part of her son's life in a parental fashion. Appellant posits her facts are similar to those in *In re Aljamie D.* (2000) 84 Cal.App.4th 424 and *In re Michael D.* (1996) 51 Cal.App.4th 1074.

In *Aljamie D.*, the appellate court determined the trial court had improperly denied a section 388 hearing as the mother had completed numerous education programs and

parenting classes, had drug-tested clean weekly for over two years, had visited consistently with her children who wanted to live with her, and had attached documentation verifying her completion of the programs and testing. (*In re Aljamie D.*, *supra*, 84 Cal.App.4th at pp. 428, 432.) In *Michael D.*, the court concluded it was in the child's best interest for the mother to regain custody as mother had a new baby who was not born positive for drugs, had regular contact with her child who wanted to live with mother, was actively participating in parenting classes and drug counseling, testing clean and had terminated an abusive relationship and was in a stable relationship. (*In re Michael D.*, *supra*, 51 Cal.App.4th at pp. 1079, 1081, 1087-1088.)

In contrast, in denying appellant's section 388 petition without a hearing, the court found appellant had failed to show a change of circumstances as she had failed to fully comply with her case plan and failed to show it would be in J.'s best interests to reinstate reunification. Appellant attached no proof of her job or residence to her petition. As appellant filed the petition on July 21, 2008, after moving to Tennessee in April, those facts seem at best to be evidence of possible changing circumstances not changed circumstances. (See *In re Baby Boy L.* (1994) 24 Cal.App.4th 596, 610 ["A mere prima facie showing of changing . . . circumstances was not enough to require or justify a hearing on return of the child."].)

Although early in the case, as ordered by the court, appellant enrolled in school and attended counseling, she dropped out of both, and there was no evidence that she subsequently complied with those orders. Appellant provided no details of the out-of-state parenting class she took. Thus, appellant did not show a genuine change of circumstance or new evidence. (See *In re Anthony W.* (2001) 87 Cal.App.4th 246, 250-251 & fn. 4 [The petition may not be conclusory, but must present specific allegations, e.g., declarations or other attachments such as a parent's description of participation in some aspect of a case plan or a therapist's letter describing the parent's progress in therapy of a parent's ability to parent.].) As far as appellant no longer being a minor, the court would have been aware of that fact. (*In re Angel B.*, *supra*, 97 Cal.App.4th at p.

463 [The reiteration of facts already part of the record do not constitute evidence of changed circumstances.].)

Appellant's best interests argument is essentially based only on the fact she is J.'s mother. Appellant claims she never had the chance to raise J. because she was a minor and she would give him just as good an opportunity as he would receive from anyone else. The best interests analysis includes consideration of the parent's resolution of the causes for the initial detention, and, after reunification services have been terminated, the child's need for permanency and stability. (*In re Angel B., supra,* 97 Cal.App.4th at pp. 463-464.)

Early in the case, the court admonished appellant about the importance of complying with its orders and the need to do so in order to be reunited with her son and the short time she would be offered services before the court's concern would shift to J.'s interest in stability as opposed to reunification. Appellant's admits she had 18 months of services prior to their being terminated in August 2005; her request for reinstatement of reunification services is an indication that she is now (two and a half years after termination of services and more than four years after J. was detained) ready to start to learn to be a parent. Appellant claims she is not like the parent in *Angel B.* who had been sober for a very brief time after many years of drug addiction and provided no supporting evidence of best interests. (*In re Angel B., supra,* 97 Cal.App.4th at p. 465.) To the contrary, appellant was in an analogous position as she had only recently obtained housing and a job for which she provided no documentation. In addition, as appellant now lives in Tennessee, if J. was eventually returned to her custody that would impose a drastic change in J.'s stability by taking him away from the only parental figure he had known -- grandfather.

Accordingly, the court did not abuse its discretion in denying the petition without a hearing as appellant showed neither changed circumstances nor that J.'s best interests would be promoted by the requested change. Moreover, having failed to demonstrate changed circumstances or best interests, we need not address appellant's suggestion the

court could have made an exception to the statutorily imposed limit of 18 months of services.

II. Termination of Parental Rights

Appellant contends substantial evidence does not support the court's order terminating her parental rights as she met the exception to termination under section 366.26, subdivision (c)(1)(B)(i). This court reviews the finding an exception does not apply for substantial evidence. (*In re Dakota H*. (2005) 132 Cal.App.4th 212, 228.) "On review of the sufficiency of the evidence, we presume in favor of the order, considering the evidence in the light most favorable to the prevailing party, giving the prevailing party the benefit of every reasonable inference and resolving all conflicts in support of the order." (*In re Autumn H*. (1994) 27 Cal.App.4th 567, 576.)

A parent must show "the relationship promotes the well-being of the child to such a degree as to outweigh the well-being the child would gain in a permanent home with new, adoptive parents. In other words, the court balances the strength and quality of the natural parent/child relationship in a tenuous placement against the security and the sense of belonging a new family would confer. If severing the natural parent/child relationship would deprive the child of a substantial, positive emotional attachment such that the child would be greatly harmed, the preference for adoption is overcome and the natural parent's rights are not terminated. [¶] Interaction between natural parent and child will always confer some incidental benefit to the child. The significant attachment from child to parent results from the adult's attention to the child's needs for physical care, nourishment, comfort, affection and stimulation. The relationship arises from day-to-day interaction, companionship and shared experiences. The exception applies only where the court finds regular visits and contact have continued or developed a significant, positive, emotional attachment from child to parent." (Citations omitted.) (*In re Autumn*

H., supra, 27 Cal.App.4th at p. 575; see also *In re Angel B., supra*, 97 Cal.App.4th at p. 466 [The parent must show "the child would be greatly harmed." (Italics deleted.)].)

In addition, the court should take into consideration the child's age, the portion of the child's life spent in the parent's custody, the positive and negative effect of the interaction between the parent and the child, and the child's particular needs. (*In re Zachary G*. (1999) 77 Cal.App.4th 799, 811.)

The court found that because of her inconsistent presence in her son's life, appellant could not show her bond with J. outweighed the benefits of stability and permanency he would have from adoption.[4]

A. Regular Visitation

Department reports show appellant visited J. at least once or twice a week from February 2007 through January 2008. The Department argues appellant's visits were not regular because she had no set time to visit, but dropped by when she felt like it. Such visits were regular as she visited two or three times a week just not at set times.

Although appellant admitted that at times her visits with J. were sporadic, she asserts any inconsistency in her visits was a result of the fact she was kicked out of her home (so her father could obtain funding for her son) and forced to move out of state to avoid living on the streets. The record shows otherwise. Appellant's visits were sporadic during the early part of the case, long before she was kicked out of grandfather's house. For the six-month review, the Department reported appellant frequently left the home for days at a time. Appellant visited weekly when she was in her own foster home. After appellant returned to grandfather's house, she fell back into her old habits, staying away for days at a time.

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[4] Appellant claims the court committed reversible error when it considered grandfather's promise to allow her to continue to visit J. when it decided to terminate her parental rights. The court did not do so.

Once appellant moved to Florida in January 2008, she no longer visited J. Appellant then telephoned J. two or three times a week.

Overall, the record also shows that prior to awarding of guardianship, appellant's involvement in J.'s life was sporadic. There is no explanation of why appellant could not find employment and remain in California. Even though appellant stated she called J. two or three times a week, she had not seen her son in six months prior to the section 366.26 hearing. As J. was four years old at the time, it is questionable whether telephone calls could be considered as maintaining a parental relationship. However, even giving appellant the benefit of the doubt and assuming arguendo that appellant's contacts with J. qualified as regular visits, she did not show a significant bond to overcome the preference for adoption.

B. Beneficial Relationship

There was evidence appellant performed a parental role early in the proceedings i.e., she burped, fed and bathed J. and was responsible for his care, appellant babysat J., played with him, cooked for him and did the natural things a mother would do. However, during most of the dependency proceedings, appellant was frequently absent from grandfather's house and had sporadic contact with J.

Appellant asserts she was more than a loving friend and had a strong bond with J. because he called her "mommy," gave her hugs and was sad when appellant left. Even though appellant was older, there was no evidence, such as an opinion by a therapist or social worker, that she had attained the maturity to be a parent.

There was no evidence, other than appellant's conclusory statement, that she had a strong bond with J. or that J. would be greatly harmed if their parent-child relationship was severed. (Compare *In re S.B.* (2008) 164 Cal.App.4th 289, 295-296, 298-301 [where the father had fully complied with the case plan and there was expert testimony of potential harm to the child should her relationship with her father be terminated]; *In re*

Amber M. (2002) 103 Cal.App.4th 681, 689-691 [testimony from the psychologist who conducted a bonding study, therapists and the social worker supported finding that maintaining the parent-child relationship outweighed adoption]; *In re Jerome D*. (2000) 84 Cal.App.4th 1200, 1206-1209 [The court concluded there was sufficient evidence to support a beneficial relationship based on expert testimony regarding the positive effect of the interaction between a boy and his mother as well as other facts.].)

As the juvenile court noted, appellant got 18 months of reunification services during which time she was busy growing up herself, and if appellant had J. then, she probably would have reunified with him, but she did not.

Appellant suggests the court should have considered legal guardianship as the permanent plan for J. The Legislature has determined adoption is the preferred permanent plan over nonpermanent forms of placement, including guardianship which is not irrevocable, as adoption affords children the "'best possible opportunity to get on with the task of growing up by placing them in the most permanent and secure alternative that can be afforded them.'" (*In re Teneka W.* (1995) 37 Cal.App.4th 721, 728.) It matters not that grandfather was the legal guardian.

DISPOSITION

The orders are affirmed.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

WOODS, J.

We concur:

PERLUSS, P.J. **JACKSON, J.**